



FEB 19 1943

United States Supreme Court

Nos. 677, 678, 679, 680.

October Term, 1942.

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Petitioner,
vs.

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BRIEF ON BEHALF OF THE CITY OF JERSEY CITY IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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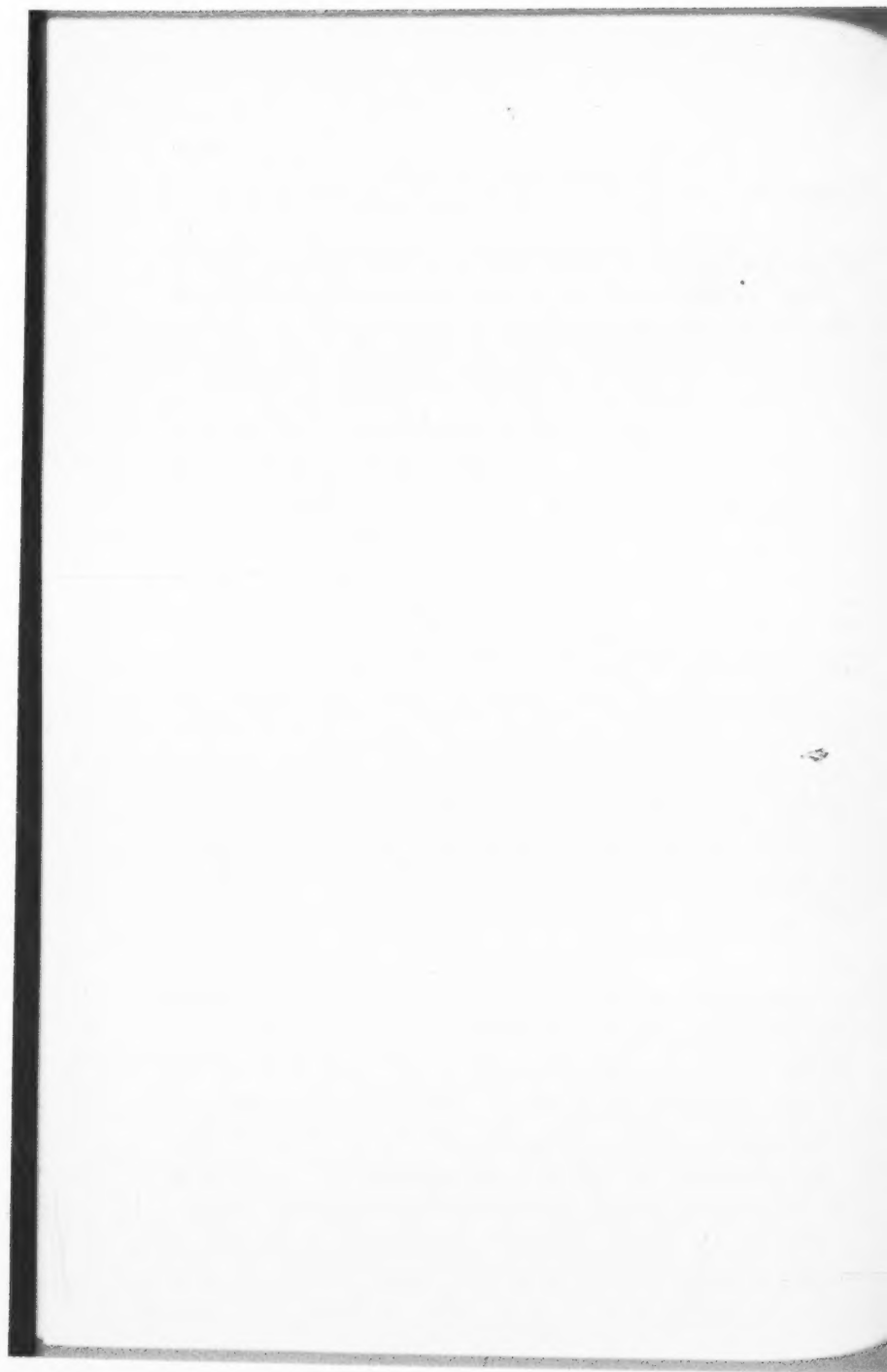
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Summary of Argument.

The petition deals at length with the question whether the valuations were made in accordance with the law of the state. It is not clear whether petitioner seeks to assert that any constitutional right was violated by reason of any of the alleged errors in the determination of the valuations

other than the error alleged to exist in the fact that the State Board inspected the premises. Although the petition expatiates on the various errors allegedly committed by the state tribunals, the constitutional argument advanced in the brief in support of the petition appears to be confined to the proposition contained in the following heading at page 39:

“Petitioner was entitled to notice of the asserted action of the State Board of Tax Appeals in making a Personal Visit to the property of Petitioner, with an opportunity to be heard regarding its action, its qualifications and its method of determining value.”

The following is a summary of our answer to the petition: In so far as petitioner challenges the correctness of the valuation and asserts that the state courts committed error in the application of state law in the determination of the true value of property, it fails to present a federal issue. There is no claim that the state tribunals singled out petitioner and intentionally subjected it to discriminatory taxation.

With respect to the inspection of the premises, by the State Board, we contend that whether or not a state tribunal may view property which is the subject matter of controversy as to value, is wholly a matter of state law, and that a determination by the state courts of that question, one way or the other, does not involve any infringement of the Fourteenth Amendment. There is no proof that the State Board did anything more than examine the premises as an aid in sifting the conflicting proof. There is no evidence that the State Board made an independent valuation on the basis of its inspection and apart from the testimony before it. It is not shown that petitioner was injured by the absence of notice of the inspection.

If it be assumed for argument that the State Board made an independent appraisal of the property based upon the inspection, such procedure would not, in any event, constitute a denial of due process because there was available to petitioner a right of review in the New Jersey Supreme Court, affording a full opportunity to be heard with respect to the correct valuation of the property. Petitioner did in fact pursue that remedy and received in the State Supreme Court a complete independent review of the issue of valuation. In the State Supreme Court proceedings petitioner had full opportunity to inquire into what the State Board did in connection with its inspection, what use it made of that inspection, and whether the members of the Board possessed qualifications sufficient to support any appraisal which it may have made. Petitioner did not undertake to adduce such proof. At any rate, the independent and complete review before the State Supreme Court fully satisfies the constitutional requirement of due process of law.

Argument.

I.

Assuming that the state tribunals incorrectly applied the principles of state law relating to the determination of the true value of the property, such error does not present a Federal question.

The bulk of the petition is devoted to a discussion of alleged errors in the determination of the true value of the building. It is alleged, for example, that too much emphasis was given to reproduction cost and inadequate emphasis to earnings. It is further pointed out that there

was no testimony offered by the City concerning the selling value of the building alone, whereas it was claimed that such testimony was adduced by petitioner and that the state tribunals were compelled to accept petitioner's proof.

It is further contended that the value of the property should have been determined in the light of the fact that the petitioner is a lessee of the land, which circumstance, it is claimed, reduces the value of the building beyond the value which it would have if the ownership of the building and of the land were in a single taxpayer. Petitioner challenges the correctness of the position of the state tribunals that the true value of land and building should be first determined as a unit and the value of the building ascertained by subtracting the value of land from the total valuation, without regard to private arrangements between the owners of the land and the owners of the building which, if given effect, might destroy the intrinsic value of the property.

The views of the state tribunals on these issues are lucidly expressed in the opinion of the State Board which appears at page 60 of the record, and in the opinion of the State Supreme Court which appears at page 603.

It is well settled that the Fourteenth Amendment does not guaranty that judgments of state courts will be free from error. The Fourteenth Amendment does not operate to impose upon the federal courts the function of super courts of appeals to review the correctness of the application of the state law by the state judiciaries. The fact of error in the application of state law does not constitute a denial of due process of law or equal protection of the law.

Milwaukee Electric Ry. & Light Co. v. Wisconsin,
252 U. S. 100 (1920);

Worcester County Trust Co. v. Riley, 302 U. S.
292 ~~133~~ (1937);
12 *Am. Jur.* 250, 273.

In *Nashville, Chatanooga & St. Louis Ry. v. Gordon Browning*, 310 U. S. 362 (1940), it was held that mere excessiveness of taxation does not constitute a violation of the federal constitution and that a federal question is raised only by a showing that the particular taxpayer was singled out for arbitrary and capricious treatment. Petitioner does not charge that it was thus selected for discriminatory treatment.

Although we believe that in the light of the authorities cited above, this court is not interested in a discussion of the evidence upon which the judgment of the state tribunals was predicated, nevertheless, a treatment of that proof is appended to this brief to demonstrate that the judgment is fully warranted.

II.

The inspection by the State Board of the property in question, without notice to the parties, does not constitute a violation of any constitutional guaranty.

Although the State Board is an appellate body, it nevertheless hears and determines the issues of fact *de novo* and on a new record prepared before it. The inspection of the premises in question is no different in kind from the commonplace examination of a locus by a jury. Surely, the bare fact of such examination is not incompatible with a fair determination of a controversy. On the contrary, such examination is conducive to a proper determination thereof for obviously, the trier of the facts is in a better

position to appraise testimony after examining the subject matter to which it relates.

Petitioner's complaint is that the parties were not notified of the time of such inspection. Petitioner, however, does not demonstrate that such failure has in anywise resulted in injury to it. The presence of its representative could not have been of any material consequence.

No authority has been cited to support the contention that a view of the premises by the trier of the facts without notice to the parties invades the constitutional right of due process. The authorities cited by petitioner to the effect that a litigant is entitled to notice of hearing, obviously do not bear upon the question whether a view may be had in the absence of such notice. Whether such view constitutes error under the law of any particular state is not the constitutional test. That test must be whether a practice permitting a view by a trial judge without notice constitutes a flagrant departure from the essentials of due process as they are universally conceived to be. The Fourteenth Amendment was not intended to freeze all legal procedure into one mold. If men may differ as to the fairness of a particular practice, no constitutional violation can be found. Surely, no one can assert that the absence of notice with respect to the view of a building, the true value of which is in dispute, where such view is made by a body which is skilled both in the trial of the facts and in the application of the law, constitutes an arbitrary and capricious procedure.

It has been held that the defendant to a criminal proceeding is not entitled to be present at a jury view of the scene of the crime.

Snyder v. Massachusetts, 291 U. S. 97 (1934);

14 *Am. Jur.* 903;

90 *A. L. R.* 598;

Wigmore on Evidence, 3d Ed., Vol. VI, p. 251 (1940).

It is an *a fortiori* proposition that a party to a civil litigation cannot assert such constitutional right.

Petitioner assumes in its argument that the State Board did more than merely inspect the property, and that the State Board in fact made its own independent appraisal. There is nothing in the record to warrant that assumption. The statement by the State Board in its opinion that it based its result upon the proofs and a view of the premises, does not warrant the inference that the State Board ignored the proofs and rested its result upon its own appraisal. The more natural interpretation is that the State Board rested its result upon the proofs judged in the light of the view of the premises.

If it be assumed for argument that an independent appraisal by the State Board would support a claim of invasion of a federal constitutional right, it surely is incumbent upon petitioner to demonstrate the existence of facts upon which it bases that claim. The state practice afforded petitioner a full opportunity to place in the record the exact story of what the State Board did upon the inspection of the premises and the use which it made of its observations. *Long Dock Co. v. State Board of Assessors*, 86 N. J. L. 592 (E. & A. 1914); *City of Hoboken v. State Board of Tax Appeals*, 14 N. J. Misc. 207 (Sup. Ct. 1936), appeal dismissed, 117 N. J. L. 119 (E. & A.) 1936). Petitioner not having undertaken to adduce the precise facts may not now be heard to predicate a claim of denial of due process upon the assumption that the proof, if adduced, would have demonstrated such violation.

In *Lynch v. People of New York*, 293 U. S. 52 (1934), this court said at page 54:

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure v. Gaillard*, 127 U. S. 216, 234, 8 S. Ct. 1053, 32 L. Ed. 125; *Johnson v. Risk*, 137 U. S. 300, 306, 307, 11 S. Ct. 111, 34 L. Ed. 683; *Walter A. Wood Mowing & Reaping Machine Co. v. Skinner*, 139 U. S. 293, 295, 297, 11 S. Ct. 528, 35 L. Ed. 193; *Eustis v. Bolles*, 150 U. S. 361, 366, 367, 14 S. Ct. 131, 37 L. Ed. 1111; *Whitney v. California*, 274 U. S. 357, 360, 361, 47 S. Ct. 641, 71 L. Ed. 1095; *Mellon v. O'Neil*, 275 U. S. 212, 214, 48 S. Ct. 62, 72 L. Ed. 245."

Since the facts necessary for the presentation of the federal question which petitioner claims to exist, were not placed in the record in the state courts, it is obvious that the judgments of the state courts did not depend upon the resolution of any federal question, and it is equally clear that there is no basis whatever upon which this court can find and determine any federal issue.

III.

Assuming for argument that the procedure followed by the State Board offends the Fourteenth Amendment, the full hearing afforded to petitioner before the New Jersey Supreme Court eliminates any issue of due process of law.

It is, of course, elementary that a taxpayer is entitled to an opportunity to be heard at some time before the tax becomes final and conclusive. *Londoner v. Denver*, 210 U. S. 373 (1908).

If it be assumed for argument that the State Board in fact made an original appraisal of the property in connection with its inspection, and that the State Board completely ignored the proofs before it, it nevertheless would not follow that any constitutional right of the petitioner was impinged. This is true because petitioner was afforded a full review of the assessment before the New Jersey Supreme Court. R. S. 2:81-8 provides as follows:

“When a writ of certiorari is brought to remove any tax or assessment, or other order or proceeding concerning any local or public improvement, or to review the proceedings of any special statutory tribunal, or to review the suspension, dismissal, retirement or reduction in rank of a person holding an office or position, state, county or municipal, from which he is removable only for cause and after trial, the court shall determine disputed questions of fact as well as of law, and inquire into the facts by depositions taken on notice or in such other manner as may be according to the practice of the court.

“The testimony taken before the tribunal, board or officer whose action is being reviewed may be used by any party and shall be considered by the court as if it had been taken by deposition on notice. Additional testimony may be taken by any party. The court may reverse or affirm, in whole or in part, such tax, assessment, or other order or proceeding, finding or determination, suspension, dismissal, retirement or reduction in rank reviewed.”

It is well settled that the State Supreme Court sits as a trier of the facts and hears the matter *de novo*. Indeed, the inquiry is not confined to the record before the State Board. New proofs may be offered either in support of, or in the attack upon, the State Board's judgment.

Long Dock Co. v. State Board of Assessors, 86 N. J. L. 592 (E. & A. 1914);

Trenton & Mercer County Traction Corp. v. Mercer County Board of Taxation, 92 N. J. L. 398 (E. & A. 1918);

Lawrence Township v. State Board of Tax Appeals, 124 N. J. L. 465 (Sup. Ct. 1940);

Haworth v. State Board of Tax Appeals, 127 N. J. L. 67 (Sup. Ct. 1941);

Hoboken v. State Board of Tax Appeals, 127 N. J. L. 179 (Sup. Ct. 1941), affirmed, 128 N. J. L. 321 (E. & A. 1942).

As we pointed out above, either party may subpoena members of the State Board in order to place upon the record such matters as they may deem to be material.

Long Dock Co. v. State Board of Assessors, *supra*;
City of Hoboken v. State Board of Tax Appeals,
supra.

There can be no doubt that the review thus provided for in the New Jersey Supreme Court fully satisfies the requirements of due process. Petitioner does not appear to argue to the contrary, but rather claims that the Supreme Court failed to discharge its statutory duty of making an independent finding of fact. After reviewing the facts, the state court said (R., p. 605, l. 14):

"We conclude that a factual question is presented and that there were proofs which justified the findings of the State Board. There is a presumption in favor of the correctness of the assessments and the burden of proving that they were excessive is on the owner.
 . . ."

The quoted language is not inconsistent with an actual determination by the Supreme Court with respect to the factual issue of valuation. In reviewing this judgment of the Supreme Court, the Court of Errors and Appeals ex-

pressly treated the decision of the Supreme Court as constituting a finding of fact by it as to the valuation of the property. It said at page 617, line 8:

“The settled rule in cases of this class is that, where the judgment of the Supreme Court on the facts is supported by proper evidence, this court will not reverse its findings. * * *

The contention of petitioner that the State Supreme Court did not make a finding of fact, involves an assumption of ignorance on the part of members of that court of routine practice relating to review of the judgments of the State Board of Tax Appeals. It is so thoroughly settled, as is indicated by the decisions cited above, that the State Supreme Court is charged with the function of making an independent fact finding, that it should not be lightly assumed that the court failed in that duty. In this regard it should also be noted that where the Supreme Court fails to make a finding of fact, the Court of Errors and Appeals may itself make such finding of fact or return the matter to the Supreme Court for its decision. The supporting authorities are cited by petitioner at page 57 of its moving papers. The fact that the Court of Errors and Appeals did not remand the matter to the Supreme Court and did not make its own finding, demonstrates that that tribunal regarded the opinion of the Supreme Court as indicating that it fully discharged its statutory duty.

It is well settled that this court will not review the question whether the state courts determined a controversy in conformity with the state law. In *United Gas Public Service Co. v. State of Texas*, 303 U. S. 123 (1938), this court said at page 139:

“With respect to the proceedings in the state courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes and the decisions of the Texas courts as to the proper procedure in the trial court

and on appeal. It is not our function, in reviewing a judgment of the state court, to decide local questions. We are concerned solely with the asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements. *John v. Paulin*, 231 U. S. 583, 585, 34 S. Ct. 178, 58 L. Ed. 381; *Lee v. Central of Georgia R. Co.*, 252 U. S. 109, 110, 40 S. Ct. 254, 64 L. Ed. 482; *Central Union Co. v. Edwardsville*, 269 U. S. 190, 194, 195, 46 S. Ct. 90, 91, 70 L. Ed. 229."

In determining the issue of fact, the State Supreme Court stated that the burden was upon petitioner to overcome the presumption of validity in favor of the assessment. In the *Lawrence Township* and *Haworth* cases cited *supra*, the New Jersey courts stated that, in exercising their duty to make an independent fact finding, the courts would start with the premise that the burden of persuasion was upon the party attacking the State Board judgment. The fact that the burden of proof is imposed upon a party to the controversy does not operate to deny due process.

Minnesota & St. Louis R. R. Co. v. Minnesota, 193 U. S. 53 (1904);

James-Dickinson Farm Mtge. Co. v. Harry, 273 U. S. 119 (1927);

86 A. L. R. 179;

12 Am. Jur. 315.6.

Conclusion.

It is, accordingly, respectfully submitted that the application for writs of *certiorari* be denied.

Respectfully submitted,

CHARLES A. ROONEY,
Attorney for and of Counsel
with City of Jersey City.

ADDENDUM.

The Tax History.

Petitioner lays great stress upon the "Tax History."

In the first place, even if the Tax History were at the same figures through all the years and if increases were difficult of explanation, the State Board, after due consideration, revised the assessments herein from \$5,137,000 to \$5,000,000. Therefore, particularly appropriate is the language of Mr. Justice Heher in the case of *Colonial Life Insurance Company of America v. State Board of Tax Appeals*, 126 N. J. L. 126, where it is said at page 130:

"It suffices to add that the '*tax history*' introduced by prosecutor *does not destroy the presumption in favor of the assessment, as revised*, and to cast the burden of proof upon the municipality * * *."

Secondly, the State Board duly considered the Tax History, as an examination of the opinion below will clearly reveal (S. C., p. 64, ll. 20-40; p. 65, ll. 1-40). Thirdly, the judgments of the County Board reducing the assessment were each a nullity and can hold no weight because they were rendered without proofs. (*Washburn v. State Board*, 127 N. J. L. 321, 322.) As for the only judgment of the State Board which shows a reduction, that for the 1932 tax, that judgment was excluded from evidence for the reason that it was immaterial, and rightly so, for the property as of the assessing date, for 1932 taxes, namely October 1, 1931, was not, as will be shown, *infra*, the same property as on the assessing dates for the tax years here under consideration (S. C., p. 153, ll. 15-30; pp. 149-151). Another and very cogent reason for its immateriality as to true value was that the predecessor of the Warehouse

Company was in bankruptcy at the time of the judgment (S. C., pp. 325-349). Further, it was at the very depth of the depression period and municipal revenues were low. Is it any wonder that the City consented to the reduction, as it did? (Ex. R-2, S. C., p. 412).

A thoughtful examination will in fact reveal this tax history to be not "arbitrary" as petitioner says but entirely reasonable and comfortable with attendant circumstances.

Never was the language of Justice Black in *United N. J. R. R., etc., Co. v. State Board*, 100 N. J. L. at 313, more appropriate:

" * * * Each annual assessment for taxation is a separate entity, distinct from the assessment of the previous or subsequent years. * * * "

During the years 1931, 1932 and 1933, the predecessor of the Warehouse Company and the then owner of this building was in bankruptcy. Depression had come on. The City, for the taxing years 1932, 1933 and 1934, consented to the reduction. If it did so because of the compulsion of the taxpayer's precarious economic status or of the heavy task of the City to obtain revenue under those conditions, its action is not and should not be indicative of an admission that the judgment consented to represented true value, nor is its action inexplicable.

Petitioner says that the increase in assessments was "arbitrary." Let us see:

The last assessment of \$3,000,000—and that in necessitous times with a bankrupt taxpayer—was for the year 1934 and was made as of the assessing date, October 1, 1933.

Here it must be recalled that this Warehouse consists of three units. President Quinn found that Unit 1 represents approximately three-thirteenths of the whole; Unit

2, five-thirteenths; and Unit 3, five-thirteenths. This, of course, is an approximation. Prosecutor's witness, Eugene L. Goldsmith, testified that Unit 1 is about one-fifth of the whole and Units 2 and 3, each, about two-fifths.

Now, as of the assessing date at which \$3,000,000 was last set as the assessment, *Unit 1 was the only building complete*. Thus, only three-thirteenths or one-fifth, whichever estimate is taken, was as of that date fully usable. Unit 3 was not usable. Eugene L. Goldsmith, who had charge of the completion of the building, testified (S. C., p. 156, l. 27; p. 157, ll. 1-12):

"Q. But it was partially incomplete? A. Very small.

Q. Unit No. 3 was open to the elements during that period of three years and considerable damage done to it through the elements? A. That is right.

Q. How big is Unit No. 3? A. I am unable to state that. I don't recall. Unit 2 and 3 are substantially the same size.

Q. Isn't Unit 3 about two-fifths of the entire Harborside Warehouse. A. Well, roughly, yes.

Q. And Unit 2 is about two-fifths and Unit 1 is about one-fifth? A. Yes."

Specifically, the so-called "Completion Agreement" between the Pennsylvania Railroad Company and Harborside Warehouse Company (Exhibit P-2), set forth the completion details necessary (S. C., p. 355, l. 25; p. 356, l. 36):

"SCHEDULE A

- (a) Complete ceiling outlets and switches in front section, third floor, and up;
- (b) Fill in pipe sleeve openings;
- (c) Complete plugged toilet fixtures;
- (d) Install 'I' beam for hoisting of 10-ton capacity;
- (e) Complete all elevators.

SCHEDULE B

Protection of Unit No. 3 Against
Deterioration

- (a) Glaze the building so as to make it weather proof;
- (b) Do such acts and take such action as you may deem fit to protect and prevent all metal parts of the building, equipment, fixtures and electrical and other equipment from rust, corrosion and deterioration;
- (c) Complete the stairway;
- (d) Remove the debris chute on the north side of the building;
- (e) Complete all elevators.

SCHEDULE C

General Items

- (a) Grade and pave the yard between Units Nos. 2 and 3;
- (b) Clean the pipe tunnel and drill holes for valves;
- (c) Screen over all roof leaders and levels;
- (d) Build directories for all Units;
- (e) Provide proper drains for all roofs;
- (f) Complete ramp."

These, it will be noted, are far more substantial as to Unit 2 than testified to by Mr. Goldsmith (S. C., p. 153, ll. 23-26).

Actually \$240,200.54 was spent by the Pennsylvania Railroad to complete these buildings. Petitioner belittles this sum. Actually, without these completions, Unit 3, representing 5/13ths of the whole Warehouse, was useless. Unit 2 was by the completion undoubtedly made far more useful and valuable to the taxpayer than it had been before, than it had been when in 1932 and 1933 (assessing dates for 1933 and 1934 taxes) it acquiesced in an assessment of \$3,000,000 (S. C., pp. 411-413). In other words, assum-

ing but by no means conceding, that \$3,000,000 was a fair assessment for 1933, and without considering the value of the completion of Unit 2 (and they were substantial; see S. C., pp. 355, 356), the completion as to Unit 3, making it a usable building and not subject to deterioration from the elements, represented an increase in usable value of $\frac{5}{8}$ of the value to which the Warehouse Company consented namely, $\frac{5}{8} \times \$3,000,000$, or \$1,875,000. This, then, would make the total \$4,875,000. It is not unreasonable to assume that the improvement and completion to Unit 2 (as mentioned in Schedule "A" of completion agreement, S. C., p. 355), of completing ceiling outlets and switches in front section, third floor and up, filling in pipe sleeve openings, completing plugged toilet fixtures, installing "I" beam for hoisting of ten-ton capacity and completion of all elevators, did not, with the use of Unit 3, account for the assessment of \$5,137,000, as set by the City.

Thus, even assuming that the \$3,000,000 assessment for 1934 was correct, the increase to \$5,137,000 for 1935 is clearly reasonable. But we cannot overlook the fact that on October 1, 1933, assessing date for 1934, the taxpayer was a bankrupt, a circumstance graphically revealing the fact that the assessment for that year must have been tempered by the necessity of the City to salvage what it could from a hulk with the "smell of bankruptcy around it," as expressed by prosecutor's witness, Mr. Morrison (S. C., p. 171, ll. 18-20), and at a time when municipalities were notoriously short of cash.

True Value.

Petitioner's main contention in this respect is grounded in three phases:

(a) No witness for the City stated an opinion which specifically stated what the property would sell for as between a willing seller and willing buyer on the assessment dates;

(b) Both of petitioner's expert witnesses did specifically state an opinion in that respect;

(c) The contention that the City relies upon "reproduction cost" as the sole factor in fixing the "true value" of the property.

These contentions of petitioner will be taken up *seriatim*, under the titles (a) "Selling price as true value," (b) "Petitioner's proof of true value," and (c) "Respondent's proof of true value."

(a)

Selling Price as True Value.

Petitioner cites the case of *Universal Ins. Co. v. State Board of Tax Appeals*, 118 N. J. L. 538. That case is sufficient to answer the attack made in this point by petitioner that an opinion as to "selling price" is the sole determinative of "true value." The language of Justice Perskie, it is submitted, is pertinent (p. 540):

"The basic weakness of this attack is that prosecutors proceed on the theory that exchange value or market value is the invariable test of true value under all circumstances. This is not so. In the words of our Court of Errors and Appeals in *Newark v. Tunis*, 82 N. J. L. 461, 81 Atl. Rep. 722 (opinion by Parker, J.),
 " * * * true value is not always to be ascertained by

*reference to selling price'; * * * special circumstances may increase or depress market value without affecting true value or vice versa.*" (Italics mine.)

And, further on:

"The case of *Newark v. Tunis*, *supra*, stands, therefore, for the principle that, under ordinary and normal conditions, exchange or *market value is a workable but not invariable test of true value*. 'It (market value) is nothing more than a convenient index and evidence of true value under ordinary and normal conditions.' *Id.*" (Italics mine.)

Here, it is respectfully submitted, there can be no competent evidence of market value under the circumstances of this case.

The buildings here under consideration are of a unique character, being subject to a lease, at the termination of which their ownership will revert to the lessor, the Pennsylvania Railroad Company (Exhibit P-2, pp. 369-402). The Warehouse could not sell the building except as subject to the lease (*Id.*). In fact, it could not sell the building without the consent of the Railroad Company, for Article 12 of the agreement between the lessor and petitioner's predecessor specifically prohibits assignment of the land lease without a consent in writing by the Pennsylvania Railroad, excepting the assignment was made to persons, corporations, or trust companies holding a mortgage or mortgages on the interest of the lessee (Exhibit P-2, S. C., p. 386, ll. 30-40). The entire Warehouse by location and use is integrated with the purposes of the Railroad Company, on one side with its rail traffic, on the other with waterfront traffic. Its construction provides for tunnels, ramps, and driveways used by the Railroad Company (Exhibit P-2, p. 378, ll. 24-40; p. 379, ll. 1-12).

Who would buy these buildings under such restrictions, other than one in a community of interest with the Railroad

Company? It is respectfully submitted that there can be no market for the property under consideration and the entire record establishes that in fact there was none.

The property is much like, though patently less marketable than, that in the case of *Happiness Candy Store v. Sexton*, 2 N. Y. Supp. (2nd) 725. There the building was erected by the Happiness Candy Stores on the land of another. The New York Supreme Court in that case said:

“There being no market, as the word is understood, the tax assessor must take and use any element which may aid in the determination of the fair value of the land and improvement.”

And, in a similar case, *Hotel Astor v. Sexton*, 287 N. Y. Supp. 746, the Supreme Court of New York said:

“Under the circumstances, no other means appear to be available for fixing the value of the building itself as distinguished from the land. The reproduction cost thereof should enter into the consideration.”

And also similar was the case of *People, ex rel N. Y. Stock Exchange Bldg. Co. v. Cantor*, 221 App. Div. 193, affirmed 248 N. Y. 533, 162 N. E. 514. The building was unique and had no “sale value,” and the court held that market value was to be used as a criterion only under circumstances where it faithfully reflected the full, true value.

Exactly in point, however, is the case of *Jersey City v. Seaboard Terminal, etc., Co.*, 19 N. J. Misc. 178, after which decision the taxpayer applied to the Supreme Court for a writ of certiorari. The application was denied (Supreme Court, No. 229, October, 1941), in an unreported decision, wherein the Court significantly comments:

“ * * * no fairly debatable question of fact or law is made to appear * * * .”

In the *Seaboard* case, the City, as here, offered no testimony of selling price. In that case, as here, a warehouse was erected on land leased by the taxpayer from a railroad, the Erie, whose operations were integrated with the functions of the warehouse. And the State Board, per Quinn, President, said at page 182:

"Petitioner's proofs were primarily based upon depreciated replacement cost of the building, both from the standpoint of cubic foot units and of detailed quantity survey. While proof of this character, dissociated from the selling value of the property, is ordinarily of low probative value (*Central Railroad Co. v. State Board* (Supreme Court, 1886), 49 N. J. L. 1; 7 Atl. Rep. 306; *Turnley v. Elizabeth* (Supreme Court, 1908), 76 N. J. L. 42; 68 Atl. Rep. 1094; *Schetty v. City of Jersey City* (State Board, 1940), 18 N. J. Misc. R. 37; 11 Atl. Rep. (2d) 18), *yet where structures of unique character, not usually sold in the real estate market, are involved, as here, resort to consideration of the physical constituents of the building and their cost may be justified.* *Ranck v. City of Cedar Rapids*, 134 Ia. 563; 111 N. W. Rep. 1027." (Italics mine.)

And the State Board rejected the estimate of market value made by taxpayer's witness, Mr. Weise, because he ascribed as a factor, the leasehold interest of the taxpayer (p. 185). So here, petitioner's real estate expert, Mr. Ryer, testified (S. C., p. 282, ll. 18-28):

"(Question repeated): 'You mean, you figured the market value of this building without land?'"

A. I don't know that I can answer that question directly, yes or no. *I figured the value of this building under a lease of the land.* That is what I tried to tell you before.

Q. *Do you mean, Mr. Ryer, that at the expiration of this lease, that this building will have no value?*

A. *No value to the owner.*

Q. Do you mean that it will have no value? A. Absolutely no value to the owner of the building." (Italics mine.)

(See also discussion of counsel, p. 265, ll. 10-22.)

In the case of *General Motors Corp. v. State Board of Tax Appeals*, 125 N. J. L. 574, a question arose as to the value of certain automobile parts. The Court noted (p. 577):

" * * * No proofs were offered as to the sale value of these parts * * *."

And held at pages 577, 578:

" * * * The statute sets the fair market price as the standard of value but that value may be determined by considering the cost to the taxpayer where, as here, the personalty was bought or manufactured to be used to assemble a finished product. * * *."

In the case of *Underwood Typewriter Co. v. City of Hartford*, 99 Conn. 329, 122 Atl. 91 (1923), a situation arose in point here. There a statute, very similar to ours, was construed by the Court. In speaking of "market value" Burpee, J., for the Supreme Court, said:

"The term contains the conception of a market, or conditions, in which there may be found a willing seller and a willing and able purchaser. The phrase connotes selling and buying without constraint or compulsion. 26 Cyc. 819; 3 Words and Phrases (Second Series), p. 301; Century Dictionary. But the trial court has said, and the evidence before us supports its statement, that there was no proof of sales of property similar in kind and size to the plaintiff's property, and that it would have been difficult to find a purchaser of such property about October 1, 1920. Considering the magnitude of this property, its location, its cost, the purpose and use for which it was constructed, adapted, and exclusively occupied, and the impossibility of changing that purpose and use without great loss

or expense, the conclusion is reasonable, if not incapable, that there was no purchaser at that time who would be able and willing to pay for it any price which its owner could fairly be expected to accept. In fact, at that time there was no market for this property, and it did not have a value which was a fair market value within the proper and approved meaning of the term."

And further (p. 93):

"We had no evidence in the record which establishes a fair market value of the plaintiff's property as that term is commonly understood and is used in the statute. Therefore, we are constrained to hold that the court erred in finding this material fact without evidence. The judgment manifestly based upon a conclusion thus erroneously made must be set aside."

And the Court goes on (pp. 93, 94):

"General Statutes, Sec. 1197, under the heading 'Rule of Valuation,' provides as follows:

'The present true and just value of any estate shall be deemed by all assessors and boards of relief to be the fair, market value thereof, and not its value at a forced or auction sale.'

Evidently the word 'actual' in section 1183 is used in the same sense as the word 'just' in section 1197. It is also evident that the words 'market value' in this statute mean a value in a market, in a place or conditions in which there are, or have been, or will be, within a reasonable time, willing sellers and able and ready buyers of property like that to be assessed, and in which sales are or have been made, or may fairly be expected, in the usual and natural way of business. That the idea of sales and of unconstrained sellers and ready buyers is in the essence of the meaning of the phrase 'market value' is indicated in the terms of the final clause, 'and not its value at a forced or auction sale.' We think therefore, that, without proof of a market of this kind, there could be no proof of a market value."

It is respectfully submitted that there is no market for the property under consideration and that, therefore, opinion as to "sale value" as urged by petitioner is not the basis of "true value" within the constitution.

(b)

Petitioner's Proof of True Value.

But, petitioner contends, its witnesses, Ryer and Stack, testified respectively that the valuation as between a willing seller and a willing buyer was \$3,000,000 and \$3,160,000.

In so doing, it is submitted, petitioner would have this court follow a "guess" with no tangible foundation and utterly devoid of basis, either in fact or reason.

It is respectfully requested that the entire testimony of the witnesses, Ryer and Stack, be read, for such a perusal will show that the conclusion reached by each was baseless (S. of C., pp. 256-291, 294-298).

In the first place both of petitioner's expert witnesses based their estimates on statements furnished them by the Harborside Warehouse Company (as to Ryer see p. 283, ll. 3-10; as to Stack, p. 297, ll. 22-24; p. 298, ll. 20-26).

But, as Mr. Quimby, who has charge of the prosecutor's accounts, testified at page 250, lines 37-41:

"Q. So that Exhibit R-3, without a profit and loss account is not accurate? A. It doesn't accurately disclose a profit or loss.

Mr. McCarthy: That is all.

Mr. Hartpense: That is all Mr. Quimby."

How then, could the expert's opinion, based on inaccurate statements, be valid? Further, Mr. Ryer testified that he did not include in the income of the property rent received from the Pennsylvania Railroad Company (S. of C., p. 292, ll. 34-40; p. 293, ll. 1-25), and Mr. Stack used the same

elements as Mr. Ryer (S. C., p. 297, ll. 22-24; p. 298, ll. 20-26) *In fact the Pennsylvania Railroad Company paid no rent even though it used valuable space and facilities* (S. C., p. 175, ll. 34-39; p. 176, ll. 27-39).

Mr. Morrison testified (S. C., p. 181, ll. 39-40 and p. 182, l. 1):

“Q. Do you receive any rent from the Pennsylvania Railroad. A. No.

Q. None, for any purpose whatsoever? A. No.”

Steam was purchased by the railroad and no rent was paid therefor (S. C., p. 219, ll. 14-16).

Exhibit R-3 shows that rents range from \$.25 to \$.16 and indicating clearly that the amount of the rent depended upon whether the tenants were shippers or non-shippers.

That such preferences and practices were used and followed by the Harborside Warehouse Company, Inc., and its predecessor and the Pennsylvania Railroad Company, is conclusively established in Interstate Commerce Commission hearings *Ex Parte 104*, “Practices of carriers affecting operating revenues or expenses.”, which matter was first decided by the Interstate Commerce Commission on December 12, 1933, and a subsequent finding in the same cause by a decision on June 8, 1936. In each of these decisions the Interstate Commerce Commission specifically dealt with the Pennsylvania Dock and Warehouse Company and the Harborside Warehouse Company, Inc., and the Pennsylvania Railroad Company, as to warehousing in the property here under appeal. That portion of the decision decided by the Interstate Commerce Commission on December 12, 1933, is annexed hereto and made a part hereof and marked Appendix “A”. That portion of the Interstate Commerce Commission’s findings decided June 8, 1936, wherein the Harborside Warehouse Company, Inc., and the

Pennsylvania Railroad Company are discussed is annexed hereto, made part hereof and marked Appendix "B".

The findings of the Interstate Commerce Commission in *Ex Parte 104* were substantially considered by the District Court, Southern District of New York, Justices Case, Patterson and Hulbert, wherein the determination of the Interstate Commerce Commission's findings in *Ex Parte 104* were affirmed, 20 Fed. Supp. 273. This determination of the District Court, Southern District of New York, was subsequently appealed to the United States Supreme Court and affirmed in a determination of Mr. Justice Reed, reported 305 U. S. 507 and 59 Supreme Court Reporter, October Term, 1938, at page 284.

Are not these facts elements of the rental value? Yet, neither of the petitioner's witnesses considered them, as their opinions were based on the company's statements (S. C., p. 283, ll. 3-10; p. 297, ll. 23-24; p. 298, ll. 20-26), which of course would not show income from these sources. Thus, the opinions of petitioner's experts, based upon statements which are first inaccurate and secondly incomplete, cannot be considered even if their method of arriving at their conclusions were valid.

But, even that method is in fundamental contravention to the theory of valuation for property taxation under our statutes. Each of the witnesses based his valuation on the sale price of the leasehold (S. C., p. 282, ll. 18-40; p. 297, ll. 22-24. See also argument by counsel, p. 265, ll. 11-23).

It is well settled that the taxing districts are entitled to hold every parcel of realty in its full value to a *fee owner* (see *Becker v. Little Ferry*, 125 N. J. L. 141, aff. 126 N. J. L. 338). Carrying the theory of petitioner's witnesses to its logical conclusion would mean that, towards the end of the lease, the property would have no value. That being so would it not be subject to taxation, even though as a bene-

fiary of municipal service and protection it should share the burden of the expenses thereof. Analogically, if the term of the lease were five years, at the end of that term the leasehold of course would have little if any sales value. Would petitioner's witnesses then say it should not be subject to taxation? Clearly, their theory would lead to absurd results.

Neither of prosecutor's witnesses allocated any value to the improvement or to the land, thus contravening the well established theory of valuation of an improvement alone.

Koch v. Jersey City, 118 N. J. L. 85.

As President Quinn says in his opinion below :

"But, as already noted, the taxpayer herein offered no proof intended or calculated to be directed to the selling value, as between a willing buyer and seller by fair contract at private sale, either of the parcel as an entirety or of the land alone. Nor was there any attempt to show, even by capitalization of income, the value of the improvement to a fee owner thereof. The conception avowedly held by its witnesses of the issue herein, was that of the value of *the particular business enterprise housed in the improvement*, based upon capitalization of net income, but charging against earnings a deduction for a sinking fund to recapture the value of the building during the term of leasehold, because of the reversion of the buildings to the lessor at the termination of the lease, as well as a deduction for rent paid to the landlord. The value thus arrived at for the improvement was \$3,100,000. In other words, this valuation was that of the leasehold to the business tenanting the building. This approach fundamentally misconceives the theory of valuation for property taxation under our statutes. The taxing districts are entitled to hold every parcel of realty accountable for taxes in its full true value to a fee owner, and in the amount for which the property could be sold by fair

sale, unfettered by leases or other restrictions created by private contract. See *Becker vs. Little Ferry*, 125 N. J. L. 141 (Sup. Ct. 1940). And it does not matter that the assessment was levied against a named taxpayer holding less than a fee interest in the property. *Id.* at page 144."

Pointedly, with reference to the weight of his opinion as to market value, Mr. Ryer testified that he never sold a storage warehouse of the size here under consideration, that he did not know of any cold storage warehouse properties of this size that have been sold by private contract in Jersey City; that he never built any building of this size, that in fact he was not a builder. He knew of no comparable sales (S. C., p. 276, ll. 1-32; p. 284, ll. 11-40; pp. 285, 286).

Mr. Stack testified that he never sold any buildings of this character, nor did he know of the sale of any buildings of this character. He knew of no sale of any storage warehouse property of this size by private contract in Jersey City or Hudson County. He had never been a builder or contractor (S. C., p. 297, ll. 30-39; p. 298, ll. 1-17).

In short, it is respectfully submitted that petitioner's argument resolves itself to the proposition that simply because its witnesses uttered an *opinion* as to what price a willing buyer would pay a willing seller, that that opinion so given would have bound the State Board. Respondent submits that such figures are nothing more than fanciful guesses, grossly incompetent and baseless, and though petitioner condemns the failure of the City's experts to express opinions as to selling value, it is submitted that they did not do so because no one could, with reason.

Petitioner further contends that the City is bound by the recital in the deed of the Selling Master in bankruptcy wherein the consideration is given as \$2,100,000, and says:

“ * * * that the purchasers thereof were the highest and only bidders * * * .” (Petition, p. 17.)

That “forced sales” are no criterion needs no citation. That a bankruptcy sale is a “forced sale” is equally true. That the purchasers were the “only bidders” is absolute confirmation of the City’s argument heretofore that there was no market for this property and there could not be, nor could there be a sale to any other buyer than one in community of interest with the Pennsylvania Railroad Company. And such a person, the Harborside Warehouse Company, of identical management personnel, was the “only bidder.” The fact proves the contention.

Petitioner says in its petition (p. 8)

“Obviously the purchasers approach the class of ‘willing purchasers.’”

Significantly, it is submitted, petitioner does not claim that the sellers even “approach” the class of “willing sellers,” and that is as much an element of the rule as “willing purchaser.” It is further to be noted that this price was paid *before* the completion of Units 2 and 3.

Petitioner makes much of the fact that its books show that from its inception the Warehouse Company operated at a deficit, and that economic factors, depression, etc., adversely affected its business.

As admitted by petitioner’s witness, Mr. Quimby, its books do not accurately indicate the true profit and loss condition (S. C., p. 250, ll. 38-40). Further, the interassociation of the warehouse with the Pennsylvania Railroad Company and the latter’s use of space and facilities without rent (S. C., p. 181, ll. 39-40; p. 182, l. 1, and p. 219, ll. 14-16; see also “Appendices ‘A’ and ‘B’” hereto) must be a further prism through which to look at this picture. A perusal of Exhibit P-3, data regarding the rent roll,

will show the range of rents charged to shippers and non-shippers (S. C., p. 409). When thus viewed, the "unhealthy" condition dims.

Further, though petitioner argues that business has progressively become worse, yet the verified petitions of appeal to the Hudson County Tax Board for the years 1935, 1936, 1937 and 1938, each signed by George Morrison, President, under oath, expressly state that progress was made in each of those years in obtaining business (S. C., p. 580, ll. 35-40; p. 581, ll. 1-3; p. 583, ll. 36-40; p. 584, ll. 1-3; p. 586, ll. 36-40; p. 587, ll. 1-3; p. 589, ll. 36-40; p. 590, ll. 1-3). The same statements show that the percentage of rentals between 1935 and 1938 rose some 27.8% (Id.).

Even if a deficit is shown, as was said in *Gibbs v. State Board of Taxes*, 101 N. J. L. 371, at page 373:

"Income is only an element to be taken into consideration where a property is so situated that the yearly rental reflects its true value. It is no criterion for an assessor in making a valuation for the purpose of taxation."

In *Griffith v. Newark*, 125 N. J. L. 57, prosecutor had erected a building fifteen stories in height, the lower floors being used as a piano store and warehouse by the Griffith Piano Company, a business operated by the prosecutor. The upper stories were divided into and rented as offices. It was urged that the assessment was too high because rentals did not justify it. The court said at page 58:

"But it is admitted that the building is out of the ordinary in that the prosecutor constructed it as sort of a monument to himself. That being the case no doubt value was put into the structure on which no adequate return was anticipated. In such a situation, the income obtained from that part of the premises which is rented is assuredly not the sole test of value,

as seems to be the claim of the prosecutor. Vacant land yields no return, yet it could not be argued that such land is without value."

It is respectfully submitted that this warehouse, while not erected as a monument, nevertheless was erected for the express purpose of attracting freight customers to the Pennsylvania Railroad (See I. C. C. report *Ex Parte 104*, Appendix "A" and Appendix "B" hereto) with the thought in mind and in purpose that considerable of its space and facilities were to be used by the Railroad without rent (S. C., p. 181, ll. 39-40; p. 182, ll. 1-2). And such is the fact (S. C., p. 181, ll. 39-40; p. 182, ll. 1-2). Otherwise why would the Pennsylvania Railroad Company *pay* for the completion of Units 2 and 3, as testified by its construction supervisor, Mr. Goldsmith (S. C., p. 155, ll. 30-40).

Truly, the value of the property results from its use, and the use here is not reflected in rental returns, but in the sum value of the building and the value of this Warehouse adjacent to and as auxiliary to the track and water-front operation of the Pennsylvania Railroad.

The opinion below amply considers the earnings and shows their weak value, with respect to this improvement. The Board had ample evidence of the unreliability of petitioner's books as shown *supra* and ample proof that the rentals do not indicate the "true value" of this particular improvement. The treatment by the Board of the question of earnings forcefully shows the consideration given to the question and the weakness of petitioner's argument in this respect. (See opinion, S. C., p. 71, ll. 20-40; pp. 72, 73.) Certainly, in this case, it cannot be said that "the assessment was made in plain violation of established principles." Rather, it was in accord.

(c)

Respondent's Proof of True Value.

Petitioner, in its brief, criticizes the City's proof below as follows:

"The only evidence presented by the City before the State Board was the testimony of two witnesses whose figures were confined to construction costs, as of the respective assessment dates, with a slight allowance for physical depreciation and obsolescence, leaving, as they termed it, a "sound value" varying from \$6,100,500.00 to \$7,226,800.00, according to the testimony of the City's witness, Mr. Robertson (Record, p. 89, ll. 27-40), and from \$6,049,887.98 to \$7,063,742.84, according to the City's witness, Mr. Phillips (Exhibit P-1, Record, p. 112, l. 1; p. 316, ll. 3-6)." (Petition, p. 9.)

This point, in varying language, is reiterated throughout the petition. As, for instance:

"Cost of reproduction, less a slight allowance for depreciation and obsolescence, alone was considered." (Petition, p. 11.)

Now, in fact, cost of reproduction less depreciation and obsolescence, was by no means the only evidence, as will be shown *infra*.

However, petitioner goes on to criticize cost of reproduction as evidence and cites the cases of *C. R. R. Co. v. State Board*, 49 N. J. L. 1; *Schetty v. Jersey City*, 18 Misc. Rep. 37; *Universal Insurance Co. v. State Board*, 118 N. J. L. 538; *The Borough of Bradley Beach v. State Board*, 124 N. J. L. 36.

The cases cited are not applicable to the case here under consideration. In each of the cases there was involved

assessments which included land and improvements and there is no dispute as to the law in such a situation, the test undeniably being the true market value but in this case, as in *Newark v. Timer*, 12 N. J. Misc. 125, the appeal is only as to the improvement and, therefore, testimony must be directed to the valuation of the building. In each of the cases cited, the situation was entirely different than in the case at bar. In each of the cases cited, the taxpayer was the owner of the land and the improvement, both were under appeal. In the case at bar, title to the land is held by the Pennsylvania Railroad, assessed by the State Tax Commissioner, title to the improvement is in the Warehouse Company and assessed locally.

In each of the cases cited, the property was of ordinary character, readily salable on the open market, whereas the property here under appeal is unique in character, not readily salable and the land and building could not be sold by any one party.

However, a full quotation of the language of Chief Justice Beasley in the case of *C. R. R. Co. v. State Board*, will show the true import of the decision (at pp. 5, 6):

“But it is again objected that the state board, in estimating the value of these roads and structures, took, as the absolute standard of value, either the original cost of acquisition and construction, less wear and tear, or the cost of reproduction.

We think this premise is not to be conceded, for there is no evidence from which it can reasonably be inferred, that so fallacious a measure of value was adopted. It is common knowledge that what a thing has cost is no infallible criterion of its market value; it is therefore to the highest degree improbable that the officers composing this board, who have manifested, so conspicuously, both capacity and knowledge with reference to the multifarious and intricate subjects embraced in these suits, could have fallen into an error so utterly puerile.

That the Board ascertained the cost of acquisition and construction is beyond doubt; it could scarcely perform its function intelligently without doing so, for such cost, though not an incontestable evidence of exchangeable value, is nevertheless almost always an important particular in the mass of circumstances laying the basis of a rational judgment touching the value of anything as an article of sale. That the state board used cost in the way thus indicated is clear, but it is not shown that it was used as an absolute measure. The inference drawn by counsel, that because the cost as ascertained and proved by the engineers who were the witnesses called by the state very often agrees in amount quite closely with the valuation found by the board, therefore the standard of cost was adopted by the board is, we think, not warranted. Such approximations between these respective valuations were to be expected, for no reason is perceived why the property of a successful railroad is not worth about the sum that it would cost to replace it, allowance being made for its depreciation from use." (Italics mine.)

So here, the Board did not consider cost of reproduction alone (see Opinion of Quinn, Pres., S. C., pp. 63-73) and as will be specifically pointed out *infra*.

Likewise the *Schetty* case, cited by petitioner, merely reiterates that reproduction cost is not an *exclusive* test. The City does contend that it is exclusively so.

The case of *Atlanta B. & O. Ry. Co. v. United States*, 296 U. S. 33, is not at all in point. It concerns itself with valuation for "accounting purposes" under the rules of the Interstate Commerce Commission. Those rules as the court points out at page 35:

" * * * provide generally that the investment account shall show the 'actual money cost to the accounting carrier' * * * ."

Such is not the test here.

The principle stated in *Universal Ins. Co. v. State Board*, 118 N. J. L. 538, that only under "ordinary or normal conditions" is "market value" workable is precisely the City's contention. This is *not* an ordinary or normal condition. This is a condition identical with the situation presented in *Jersey City v. Seaboard Terminal, etc., Co.*, 19 Misc. Rep. 178, writ denied, where the warehouse was on land leased from the Erie R. R. and wherein it was said, at page 182:

" * * * yet where structures of unique character, not usually sold in the real estate market, are involved, as here, resort to consideration of the physical constituents of the building and their cost may be justified * * *."

As said in the *Universal* case:

"Taxation is an intensely practical matter * * *. It is an intense reality."

Thus soundly does Judge Burpee say in *Underwood Typewriter Co. v. City of Hartford* (*supra*):

"But it does not follow that, when the tax assessors cannot ascertain the market value of certain property, they cannot determine the valuation of that property for legal taxation. If the rule of taxation provided by statute cannot be applied, the law still commands, that all property liable to taxation shall be put in the owner's list at its present true and actual valuation. The general law is not nullified or modified by the particular statute which lays down a rule of valuation. But the law never requires the impossible. Hence, if the rule indicated cannot be followed, other means must and may be found by which the assessors can perform the duty the law has put upon them. One of the means which have been approved and sometimes used is to ascertain the original cost of construction and improvement, deducting therefrom depreciation, and adding the increase in cost of materials and labor, if at

the time of valuation there is such increase over the cost at the time of construction. *Another method frequently adopted is to determine what it will cost to reproduce the plant, or the cost of replacement at the time of valuation, and to deduct therefrom for depreciation in the existing plant.* Both methods may be and have often been resorted to and considered in fixing present true and actual value. *Pioneer Telegraph & Telephone Co. v. Westonhaver*, 29 Okl. 429, 118 Pac. 354, 38 L.R.A. (N.S.) 1209. But the result of neither should necessarily be taken as the invariable measure of value. Either method and its result when reasonably applied may be of service in ascertaining the actual value. *Smyth v. Ames*, 169 U. S. 466, 547, 18 Sup. Ct. 418, 42 L. Ed. 819; *Minnesota Rate Cases*, 230 U. S. 352, 452, 33 Sup. Ct. 729, 57 L. Ed. 1511, L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18." (Italics mine.)

And, as was said by the Supreme Court of New York in the case of *Hotel Astor v. Sexton*, 287 N. Y. Supplement, 746, wherein the building in question was on leased land:

"Under the circumstances, no other means appear to be available for fixing the value of the building itself as distinguished from the land. The reproduction cost thereof should enter into the consideration."

The precise method of proof used here was used in *Jersey City v. Seaboard Terminal, etc., Co.* (*supra*). As is said in that case at page 182 of 19 Misc.:

"Petitioner's proofs were primarily based upon depreciated replacement cost of the building, both from the standpoint of cubic foot units and of detailed quantity survey. * * *."

And the assessment was upheld and, on application for a writ of certiorari was denied by the Supreme Court with the comment that "no fairly debatable question of law or fact is presented."

Thus the City produced two qualified witnesses as to the reproduction cost of the buildings less depreciation and obsolescence. Mr. Robertson placed a value as of October 1, 1934, of \$6,100,500 (S. C., p. 89, ll. 20-29); as of October 1, 1935, \$6,194,400; as of October 1, 1936, \$6,502,000; as of October 1, 1937, \$7,226,800 (S. C., p. 89, ll. 29-39).

Mr. Phillips, after making a quantity survey, placed the true value as of October 1, 1934, at \$6,049,887.98; as of October 1, 1935, at \$6,153,600.26; as of October 1, 1936, at \$6,420,194.31; as of October 1, 1937. (Exhibit P-1; p. 316, ll. 1-6.)

These valuations do not, however, as prosecutor says, stand by themselves. They are confirmed, and in fact shown to be moderate, by these very pertinent elements in the record:

a. The original lease between the Pennsylvania Railroad Company and the predecessor of prosecutor was expressly conditioned upon erection by the lessee of buildings described therein in terms corresponding to the buildings actually erected, which were to cost \$8,536,000. (Ex. P-2; S. C., p. 378, ll. 12-30.) *This same element was considered in the Seaboard case (supra) at p. 182.* There is nothing to show that those terms were not carried out.

b. The same lease provided for the execution by the lessee of bonds in the sum of \$7,000,000 conditioned upon the completion of the buildings, tunnel, driveway and ramp. (Ex. P-2, S. C., p. 380, ll. 1-16.)

c. On October 23, 1933, the Board of Directors of the Harborside Warehouse Company, Inc., approved the issuance of two mortgages and deeds of trust one in the amount of \$2,500,000 a forty-year leasehold mortgage and deed of trust and the issuance of a mortgage and deed of trust in the sum of \$5,750,000 to secure 40 yr. income bonds. (Ex. R-4, p. 461, ll. 28-35.)

d. The Warehouse Company carried these buildings on its own books at the following values on the respective dates:

September 30, 1934—\$7,350,000.00 (Ex. R-4; p. 417);
 September 30, 1935—\$7,409,773.70 (Ex. R-4; p. 417);
 September 30, 1936—\$7,459,197.32 (Ex. R-4; p. 504);
 September 30, 1937—\$7,345,703.16 (Ex. R-4; p. 504).

And these dates are respectively only one day before the assessing dates here under consideration.

Petitioner seeks to minimize the probative weight of the book values, and cites the case of *Hackensack Water Co. v. Haworth*. Of that case petitioner says (petition, p. 31):

“President Quinn pointed out that it (book value) had no controlling value or effect, even where it was admitted by the taxpayer that it represented valuation for all purposes, and not peculiarly for rate-making purposes.”

An examination of the opinion therein reveals that the language quoted is by no means the holding of the case. In fact, the book value was therein rejected because as the opinion says (at p. 221):

“ . . . the borough fails to demonstrate that any particular part of the total book figure is appropriately apportionable to the Haworth land. The total includes the cost of the dam, all of which is situated in the Borough of Oradell. This dam, with its accompanying structures, which are assessable as improvements (Hackensack Water Co. v. Borough of Woodcliff Lake, New Jersey Tax Reports, 1934-1939, p. 145), have been alone assessed for taxation by the Borough of Oradell at a valuation in excess of \$2,000,000. It is thus apparent that introduction of the book value of the whole reservoir has not been made probative of the true value of that portion thereof consisting of the land situated in Haworth.” (Italics mine.)

Thus, the book value therein failed to show the value of the land in question, namely, that in Haworth.

The cases of *Woodcliff Lake v. State Board*, 14 Misc. 132; *Hackensack Water Co. v. State Board*, 122 N. J. L. 596; *Haworth v. State Board*, 127 N. J. L., and *Universal Ins. Co. v. State Board*, 118 N. J. L., are not in point here, for the book value herein was not for rate-making purposes (S. C., p. 213, ll. 21-39; p. 214, ll. 1-22). Either the book value here is true value or is set up as a fraud.

Rightfully then have our courts established book value as a strong criterion of value. As was said in *General Motors Corp. v. State Board of Tax Appeals*, 124 N. J. L. 212, at page 213, aff. 125 N. J. L. 574 (Court of Errors and Appeals):

“ * * * The board could hardly have accepted a valuation which would treat such personal property as of less value than prosecutor's own inventory. * * * ”

In this respect, the decision in *Jersey City v. Seaboard Terminal, etc. Co.*, *supra*, exactly comparable to the case *sub judice*, is conclusive:

“*Since our courts have considered book value as a persuasive factor in determining statutory true value (Second National Bank and Trust Company of Red Bank v. State Board of Tax Appeals, 114 N. J. L. 573; 178 Atl. Rep. 96; General Motors Corp. v. State Board of Tax Appeals (Supreme Court, 1940), 124 N. J. L. 212; 11 Atl. Rep. (2d) 314), this evidence weighs in favor of the taxing district's contention to the effect that the original assessment was not excessive, and this particularly in view of the absence of direct and reliable proof of the selling value of the building.*” (Italics mine.)

And the book value of petitioner, for each year, was at least \$2,300,000 more than the assessment as revised by the State Board.